Supreme Court, U. S.
FILED
MAY 14 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1583

ALLSTATE INSURANCE COMPANY, an Illinois Corporation,

Petitioner,

vs.

FRANK J. KELLEY, Attorney General of the State of Michigan, LEAGUE GENERAL INSURANCE COMPANY, et al.,

Respondents.

BRIEF OF RESPONDENT LEAGUE GENERAL INSURANCE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES BY ALLSTATE INSURANCE COMPANY

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PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1979

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ARGUMENT

THE MICHIGAN SUPREME COURT DECIDED THIS QUESTION ON STATE CONSTITUTIONAL GROUNDS; THEREFORE, THERE IS NO ISSUE BEFORE THIS COURT.

The case law is well settled that if a state court decides an issue on state constitutional questions, that case cannot be reviewed by the United States Supreme Court, even though there may also be federal questions involved.

We do not attempt to settle the dispute; but, assuming for present purposes only that petitioner's view is the correct one, the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule had become firmly fixed at least as early as *Klinger* v. *Missouri,* 13 Wall. 257, 263, and has been reiterated in a long line of cases since that time. It is enough to cite, in addition to the *Klinger* case, the following: *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157, 163-165; *Petrie* v. *Nampa Irrigation District,* 248 U. S. 154, 157; *McCoy* v. *Shaw,* 227 U. S. 302; *Eustis* v. *Bolles,* 150 U. S. 361.

—*Fox Film Corp.* v. *Miller,*
296 U. S. 207, 209-210 (1935)

See also the 1874 landmark case of *Murdock* v. *City of Memphis,* 20 Wallace 590 (1874).

The United States Supreme Court has also held that in case of an ambiguity as to whether a state court decided an issue on the state constitutional question or on a federal constitutional question, the judgment of the state court can be vacated and remanded to that court for further proceedings and clarification.

It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution

of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. Only then can we ascertain whether or not our jurisdiction to review should be revoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions.

For these reasons we vacate the judgment of the Supreme Court of Minnesota and remand the cause to that court for further proceedings.

Judgment vacated.

—*Minnesota* v. *National Tea Co.,*
309 U. S. 551, 557 (1940)

A. THE MICHIGAN STATE SUPREME COURT DECIDED THE DUE PROCESS QUESTION RAISED BY PETITIONERS ON THE MICHIGAN STATE CONSTITUTIONAL PROVISION FOR DUE PROCESS.

The Michigan state constitutional provision for due process is as follows:

> Sec. 17. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.
>
> —Const. 1963, art. 1, § 17.

In the *Shavers* case, the Michigan Court raised, ***sua sponte,*** the following question:

> We perceive the issue of the constitutionality of the "compulsory insurance requirement" of § 3101(1) to be, in essence, two-fold:
>
> • • •
>
> (B) Does the present regulatory scheme for compulsory no-fault insurance sufficiently protect the interests of registrants and operators of motor vehicles in accord with the due process clause of the Michigan and United States Constitutions as to
>
> (1) the fairness of insurance rates, and
>
> (2) the proper availability of insurance.
>
> —*Shavers* v. *Attorney General,* 402 Mich. 554, 594-595 (1978)

The Michigan Court then proceeded to answer question (B) as follows:

> In choosing to make no-fault insurance compulsory for all motorists, the Legislature has made the registration and operation of a motor vehicle inexorably dependent on whether no-fault insurance is available at fair and equitable rates. Consequently due process protections under the *Michigan* and United States Constitutions (Const 1963, art 1, § 17; US Const, Am XIV) are operative.
>
> The Legislature has, additionally, fostered the expectation that no-fault insurance will be available at fair and equitable rates. Section 2403(1)(d) of the Insurance Code states that "Rates shall not be excessive, inadequate or unfairly discriminatory", MCL 500.2403(1)(d); MSA 24.12403(1)(d); § 3301(1)(a) of the Insurance Code provides the "guarantee" that no-fault insurance coverage "will be available to any person who is unable to procure such insurance through ordinary methods". MCL 500.3301(1)(a); MSA 24.13301(1)(a).[23]
>
> We therefore conclude that Michigan motorists are constitutionally entitled to have no-fault insurance made available on a fair and equitable basis. The availability of no-fault insurance and the no-fault insurance rate regu-

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[23]

This is a separate and independent basis for invoking due process protection for Michigan motorists required to purchase no-fault insurance. See *Viculin* v *Dep't of Civil Service,* 386 Mich 375, 387; 192 NW2d 449 (1971); see, also, *Paul* v *Davis,* 424 US 693, 710-711; 96 S Ct 1155; 47 L Ed 2d 405 (1976); *Bishop* v *Wood,* 426 US 341; 96 S Ct 2074; 48 L Ed 2d 684 (1976); *Meachum* v *Fano,* 427 US 215, 226; 96 S Ct 2532; 49 L Ed 2d 451 (1976); *The Supreme Court, 1975 Term,* 90 Harv L Rev 86-104 (1976).

latory scheme are, accordingly, subject to due process scrutiny.[24]

—*Shavers, supra,* 599-600
Emphasis added.

Thus, the Michigan Supreme Court decided the question of the fairness of insurance rates and the proper availability of insurance based on the due process provisions of ***both*** the United States Constitution and the Michigan Constitution. It is essential to recognize that in the following sentence the Michigan Supreme Court used the word *"and"* in the ***disjunctive*** and not the ***conjunctive*** sense:

> Consequently due process protections under the Michigan *and* United States Constitutions (Const 1963, art 1, §17; US Const, Am XIV) are operative.
>
> —*Shavers, supra,* 599.
> Emphasis added.

Thus, it is clear that the Michigan Supreme Court said that the due process protections of the United States Constitution are available and also of the Michigan Constitution.

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[24]

We note that at least two courts have held that consumers have an insufficient interest to invoke due process with respect to utility rates. ***Holt*** v ***Yonce,*** 370 F Supp 374 (D SC, 1973); ***Sellers*** v ***Iowa Power & Light Co,*** 372 F Supp 1169 (SD Iowa, 1974). We believe these cases are distinguishable from the instant challenge to the no-fault insurance rate-making scheme. First, insurance underwriting and rate-making, unlike utility rate-making, inherently involves discrimination among individuals. Insurance policies are written in accord with an insurance company's perception of an individual's risk. Serious equal protection issues are, thereby, implicated. Second, no history of careful rate-regulation exists with respect to the insurance industry. Lewis, Comment: ***Insurance Rate Regulation in Pennsylvania: Does the Consumer Have a Voice?,*** 81 Dickinson L Rev 297, 304-305 (1977).

THEREFORE, EVEN IF, *IN ARGUENDO,* THIS COURT HELD THAT THE UNITED STATES CONSTITUTIONAL DUE PROCESS PROVISIONS WERE NOT APPLICABLE, THE MICHIGAN COURT DECISION WOULD STILL STAND BECAUSE IT WAS EQUALLY BASED UPON THE MICHIGAN CONSTITUTION.

It should be noted that in the sentence quoted above, the Michigan Court placed the term "Michigan Constitution" before that of "United States Constitution."

Therefore, pursuant to *Fox Film Corp.* v *Muller,* quoted above, this Court has no jurisdiction in this matter since this case was decided on state constitutional grounds.

B. THE MICHIGAN STATE SUPREME COURT HAS THE AUTHORITY UNDER THE MICHIGAN CONSTITUTION TO DECIDE AN ISSUE *SUA SPONTE.*

The Michigan Supreme Court has this right to decide a question ***sua sponte.***

The very first section of the judicial branch article of the Michigan Constitution states as follows:

> Sec. 1. The judicial power of the state is vested exclusively in *one court of justice* which shall be divided into *one supreme court,* one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.
>
> —Const. 1963, art. 6, §1
> Emphasis added.

The Michigan Supreme Court, in exercising its rule-making power, has adopted the following rules which clearly give it the authority to make a *sua sponte* decision, if it decides such is required by the case:

> 1. Relief Obtainable. The Supreme Court may, at any time, in addition to its general powers, in its discretion and on such terms as it deems just:
>
> (7) Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief as the case may require;
>
> —GCR 1963, 865.1(7)

> Rules of practice set forth in any statute, not in conflict with any of these rules, shall be deemed to be in effect until superseded by rules adopted by the Supreme Court.
>
> —GCR 1963, 16

Thus, although petitioner may not like the results of a decision arrived at *sua sponte* any more than any other decision, that decision under the Michigan Constitution and the court rules adopted by the Michigan State Supreme Court, are just as binding and effective as any other court decision.

C. THE DECISION OF THE SUPREME COURT RELATIVE TO DUE PROCESS REGARDING INSURANCE RATES AND AVAILABILITY IS JUST AND EQUITABLE.

All the Michigan Court has done is say that if the state *mandates* that individuals have automobile insurance, the state must also assure there is due process in implementing the existing statutory provision that rates are such that they

not be "excessive, inadequate or unfairly discriminatory," (MCLA 500.2403(1) (d)); and further, this mandatory insurance coverage "will be available to any person who is unable to procure such insurance through ordinary methods," (MCLA 500.3301(1) (a)).

The Michigan Court in the *Shavers* case gave the legislature and insurance commissioner 18 months from the issuance of this opinion to meet the due process requirements. *Shavers, supra,* 609.

D. MICHIGAN'S NO-FAULT LAW IS UNIQUE AND THIS CASE DOES NOT HAVE APPLICABILITY TO OTHER STATES' NO-FAULT LAWS.

A reading of the Michigan no-fault law in comparison with those of other states shows that the Michigan law is unique —not only the no-fault law referred to, but also the other statutes relative to the Insurance Code.

E. THE REQUIREMENT THAT ALL DRIVERS PURCHASE AUTO INSURANCE *IS* STATE ACTION.

In its petition for Writ of Certiorari, Allstate Insurance has sought to suggest that the Supreme Court of Michigan failed to identify an action by the state which would call for the imposition of due process guaranteed. It is claimed that "the nexus between the state of Michigan and the activities of private, no-fault insurers is not sufficiently close to treat the insurers' actions as those of the state's." (See Petition for Writ of Certiorari, page 10).

This argument ignores the fact that the state action upon which the court relies is the passage of a law, i.e., the requirement of sec. 3101 of the No-Fault Act that all persons who own or operate a motor vehicle purchase no-fault in-

surance. Passage of a law is emphatically state action. There is simply no occasion for the detailed argument in which petitioner would have the court indulge over whether or not an insurance company's private activities constitute state action because the action on which the Court has focused is the enactment of a law which no entity but the state could perform. As the court itself states, "the no-fault act compels insurance for all motor vehicles. Failure to comply with this requirement may result in criminal and civil sanctions." (See Shavers Opinion, p. 597).

Arguments of the type envisioned by petitioner arise where it is asserted that a private entity's action in reality is that of the state. For example, when a public utility cuts off service, See: *Jackson* v *Metropolitan Edison Company*, 419 US 345 (1974). In such an instance arguments must be marshalled in an effort to overcome the private nature of the entity responsible for the actions complained of. In this instance, the action complained of is the requirement that citizens purchase no-fault insurance. The requirement is imposed by the state of Michigan acting directly through its power to impose criminal sanctions. Under these circumstances no "state action" question exists.

CONCLUSION

WHEREFORE, this Court is asked to deny the petition for a writ of certiorari because the Michigan State Supreme Court based its decision on the Michigan State Constitution, independent of the United States Constitution. Or, in the alternative, if there is any ambiguity in the mind of this Court as to whether the Michigan Court acted on the state or federal constitutional provisions of due process (which ambiguity respondent denies), this Court is asked to refer this matter back to the Michigan Supreme Court for clarification pursuant to *Minnesota* v *National Tea Co., supra.*

Respectfully submitted,

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